A. Federal Preemption of State Law

The Supremacy Clause provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The upshot of this text is that when the federal government makes constitutionally valid "laws"—including statutes enacted pursuant to bicameralism and presentment—they override any state provision to the contrary. So if the federal government prohibits driving faster than 60 mph, that would preempt a state law requirement that requires drivers to maintain a 65 mph minimum speed. The prospect of that kind of direct preemption prompted significant criticism during the ratification process. Consider what one Federalist had to say in defense of the principle.

A Rhode-Island Man
Newport Mercury (Feb. 25, 1788)

> Now let us consider the objections that are laid against [the Constitution], it is said to be a consolidation, [and] if by consolidation is meant the union of several [smaller] societies into one supreme council for the sake of uniformity, efficiency, and dispatch,—it is confessed the constitution is and was meant to be so far a consolidation of the powers of the United States. The supremacy of the General Assembly of the State of Rhode-Island over the several towns and town meetings [is] just such a consolidation of the various towns, as the new constitution is of the United States,—and there is no argument against a union of States, but what is equally forcible against a union of towns in our General Assembly, for our Assembly has a sovereign unlimited power;
>
> [B]ut let us suppose for a moment this doctrine was put in practice by dissolving our Assembly and restoring sovereignty and independence to the towns, their power of refusing state taxes would soon be sanctified by pretended reason, and each town would prove, by endless arguments that they had been ever over taxed, and least they should pay too much, would take care to pay nothing, town taxes would soon be thought inconvenient and tyrannical, and therefore abolished, we should soon enjoy the blessed freedom of savages, we should be free from the fees of sheriffs and judges, every man would judge his own cause and execute his own judgment, if my neighbor kills my pigeons, I kill one of his children, I fall next, and retaliation goes on until each family is extinct….
>
> [That would be] the happy [tendency] of cautiously keeping our power in our own [hands], but Judge Blackstone says, that to suppose a government without a

supreme controling power some where lodged, is the highth of political absurdity—[why] may not supreme power be as secure from abuse in Congress, as in a General Assembly of Massachusetts, Rhode-Island, or any other State.

This section explores two different forms of federal preemption. *Zschernig v. Miller* (1968) presents the doctrine of "foreign affairs preemption," under which the Constitution directly preempts certain kinds of state interference with foreign policy, even if the federal government has not staked out a contrary position on the question at issue. *Arizona v. United States* (2012) presents a more typical case of preemption pursuant to a federal statute enacted in service of some more particularized congressional policy. As you will see, *Arizona* shows how the hardest part of preemption analysis is often the statutory interpretation involved.

Zschernig v. Miller

Supreme Court of the United States, 1968.
389 U.S. 429.

Mr. Justice Douglas delivered the opinion of the Court.

This case concerns the disposition of the estate of a resident of Oregon who died there intestate in 1962. Appellants are decedent's sole heirs and they are residents of East Germany. Appellees include members of the State Land Board that petitioned the Oregon probate court for the escheat of the net proceeds of the estate under the provisions of Ore. Rev. Stat. § 111.070, which provides for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied:

(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;

(2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and

(3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

We conclude that the history and operation of this Oregon statute make clear that § 111.070 is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. See *Hines v. Davidowitz*

(1941).

As already noted, one of the conditions of inheritance under the Oregon statute requires "proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries," the burden being on the nonresident alien to establish that fact. This provision came into Oregon's law in 1951. Prior to that time the rights of aliens under the Oregon statute were defined in general terms of reciprocity, similar to the California Act which we had before us in *Clark v. Allen* (1947).

We held in *Clark v. Allen* that a general reciprocity clause did not on its face intrude on the federal domain. We noted that the California statute, then a recent enactment, would have only "some incidental or indirect effect in foreign countries." ... It now appears[, however,] that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

In a California case, involving a reciprocity provision, the United States made the following representation:

> the operation and effect of the statute is inextricably enmeshed in international affairs and matters of foreign policy. The statute does not work disinheritance of, or affect ownership of property in California by, any group or class, but on the contrary operates in fields exclusively for, and preempted by, the United States; namely, the control of the international transmission of property, funds, and credits, and the capture of enemy property. The statute is not an inheritance statute, but a statute of confiscation and retaliation.

In re Bevilacqua's Estate (Dist. Ct. App. Cal. 1945). In its brief amicus curiae [in the present case], the Department of Justice states that: "The government does not ... contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations."

The Government's acquiescence in the ruling of *Clark v. Allen* certainly does not justify extending the principle of that case, as we would be required to do here to uphold the Oregon statute as applied; for it has more than "some incidental or indirect effect in foreign countries," and its great potential for disruption or

embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle.

As we read the [state court] decisions [on inheritance reciprocity] that followed in the wake of Clark v. Allen, we find that they radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a foreign regime as opposed to the Marxist theory.[1] The Oregon statute introduces the concept of "confiscation," which is of course opposed to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive' …." *See State Land Board v. Kolovrat*, 220 Or. 448 (1961).

That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by Clark v. Allen. Yet such forbidden state activity has infected each of the three provisions of § 111.070, as applied by Oregon.

In *State Land Board v. Pekarek* (1963), the Oregon Supreme Court[,] in ruling against a Czech claimant because he had failed to prove the "benefit" requirement of subsection (1)(c) of the statute[,] said:

> Assuming, without deciding, that all of the evidence offered by the legatees was admissible, it can be given relatively little weight. The statements of Czechoslovakian officials must be judged in light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses

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[1] See *Estate of Gogabashvele*, 16 Cal. Rptr. 77, and *Estate of Chichernea*, 57 Cal. Rptr. 135. One commentator has described the *Gogabashvele* decision in the following manner:

> The court analyzed the general nature of rights in the Soviet system instead of examining whether Russian inheritance rights were granted equally to aliens and residents. The court found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes, and unrepealed obsolete statutes. Before stating its holding of no reciprocity, the court also noted Stalin's crimes, the Beria trial, the doctrine of crime by analogy, Soviet xenophobia, and demonstrations at the American Embassy in Moscow unhindered by the police. The court concluded that a leading Soviet jurist's construction of article 8 of the law enacting the R.S.F.S.R. Civil Code seemed modeled after Humpty Dumpty, who said, "When I use a word… , it means just what I choose it to mean—neither more nor less."

Note, 55 Calif. L. Rev. 592 (1967).

> we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts.

Yet in *State Land Board v. Schwabe* (1965), where the certificate of the Polish Ambassador was tendered against the claim that the inheritance would be confiscated abroad, the Oregon court, appraising the current attitude of Washington, D.C., toward Warsaw, accepted the certificate as true.

In *State By and Through State Land Board v. Rogers*, 219 Or. 233, the court held Bulgarian heirs had failed to prove the requirement of what is now § (1)(b) of the reciprocity statute, the "right" of American heirs of Bulgarian decedents to get funds out of Bulgaria into the United States. Such transmission of funds required a license from the Bulgarian National Bank, but the court held the fact that licenses were regularly given insufficient, because they were issued only at the discretion or "whim" of the bank.[2]

As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the "cold war," and the like are the real desiderata.[3] Yet they

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[2] The Rogers case, we are advised, prompted the Government of Bulgaria to register a complaint with the State Department, as disclosed by a letter of November 20, 1967, written by a State Department adviser to the Oregon trial court stating: "The Government of Bulgaria has raised with this Government the matter of difficulties reportedly being encountered by Bulgarian citizens resident in Bulgaria in obtaining the transfer to them of property or funds from estates probated in this country, some under the jurisdiction of the State of Oregon...."

[3] Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, such as "This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists," and "If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia.... " Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule"*, 52 Nw. U .L. Rev. 221 (1957). In Pennsylvania, a judge stated at the trial of a case involving a Soviet claimant that "If you want to say that I'm prejudiced, you can, because when it comes to Communism I'm a bigoted anti-Communist." And another judge exclaimed, "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." A California judge, upon being asked if he would hear argument on the law, replied, "No, I won't send any money to Russia." The judge took "judicial notice that Russia kicks the United States in the teeth all the time," and told counsel for the Soviet claimant that "I would think your firm would feel it honor bound to withdraw as representing the Russian government. No American can make it too strong."

of course are matters for the Federal Government, not for local probate courts.

This is as true of (1)(a) of § 111.070 as it is of (1)(b) and (1)(c). In *Clostermann v. Schmidt*, 215 Or. 55 (1958), the court—applying the predecessor of (1)(a)—held that not only must the foreign law give inheritance rights to Americans, but the political body making the law must have "membership in the family of nations," because the purpose of the Oregon provision was to serve as 'an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon.'

In *In re Estate of Krachler*, 199 Or. 448 (1953), the court observed that the phrase "reciprocal right" in what is now part (1)(a) meant a claim "that is enforceable by law." Although certain provisions of the written law of Nazi Germany appeared to permit Americans to inherit, they created no "right," since Hitler had absolute dictatorial powers and could prescribe to German courts rules and procedures at variance with the general law. Bequests "grossly opposed to sound sentiment of the people" would not be given effect.

In short, it would seem that Oregon judges in construing § 111.070 seek to ascertain whether "rights" protected by foreign law are the same "rights" that citizens of Oregon enjoy. If, as in the *Rogers* case, the alleged foreign "right" may be vindicated only through Communist-controlled state agencies, then there is no "right" of the type § 111.070 requires. The same seems to be true if enforcement may require approval of a Fascist dictator, as in *Krachler*. The statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.

Berman, *Soviet Heirs in American Courts*, 62 Col. L. Rev. 257 (1962).

A particularly pointed attack was made by Judge Musmanno of the Pennsylvania Supreme Court, where he stated with respect to the Pennsylvania Act that:

> All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her "grandmother." It could be that the greedy, gluttonous grasp of the government collector in Yugoslavia does not clutch as rapaciously as his brother confiscators in Russia, but it is abundantly clear that there is no assurance upon which an American court can depend that a named Yugoslavian individual beneficiary of American dollars with have anything left to shelter, clothe and feed himself once he has paid financial involuntary tribute to the tyranny of a totalitarian regime.

Belemecich's Estate, 411 Pa. 506 (1963).

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious.

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. See *Kolovrat v. Oregon*. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in *Hines v. Davidowitz*, "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.

Reversed.

Mr. Justice Marshall took no part in the consideration or decision of this case.

Mr. Justice Stewart, with whom Mr. Justice Brennan joins, concurring.

... The Solicitor General, as amicus curiae, says that the Government does not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States. To the extent that *Clark v. Allen*, is inconsistent with these views, I would overrule that decision.

Mr. Justice Harlan, concurring in the result.

... Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany with Germany ... should be construed as guaranteeing to citizens of the contracting parties the rights to inherit personal property from a decedent who dies in his own country..... Properly construed, the 1923 treaty, which [as an Article II treaty] of course takes precedence over the Oregon statute under the Supremacy Clause, entitles the appellants in this case to succeed to the personal as well as the real property of the decedent despite the state statute.... [*Ed. note - Justice Harlan's analysis of the treaty with Germany is omitted.*]

IV.

Upon my view of this case, it would be unnecessary to reach the issue whether Oregon's statute governing inheritance by aliens amounts to an unconstitutional infringement upon the foreign relations power of the Federal Government. However, since this is the basis upon which the Court has chosen to rest its decision, I feel that I should indicate briefly why I believe the decision to be wrong on that score....

Prior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations. Application of this rule to the case before us compels the conclusion that the Oregon statute is constitutional. Oregon has so legislated in the course of regulating the descent and distribution of estates of Oregon decedents, a matter traditionally within the power of a State. Apart from the 1923 treaty, which the Court finds it unnecessary to consider, there is no specific interest of the Federal Government which might be interfered with by this statute. The appellants concede that Oregon might deny inheritance rights to all nonresident aliens. Assuming that this is so, the statutory exception permitting inheritance by aliens whose countries permit Americans to inherit would seem to be a measure wisely designed to avoid any offense to foreign governments and thus any conflict with general federal interests: a foreign government can hardly object to the denial of rights which it does not itself accord to the citizens of other countries.

[The majority's] notion appears to be that application of the parts of the statute which require that reciprocity actually exist and that the alien heir actually be able to enjoy his inheritance will inevitably involve the state courts in evaluations of foreign laws and governmental policies, and that this is likely to result in offense to foreign governments. There are several defects in this rationale.

The most glaring is that it is based almost entirely on speculation. My Brother Douglas does cite a few unfortunate remarks made by state court judges in applying statutes resembling the one before us. However, the Court does not mention, nor does the record reveal, any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.[4] The United States says in its brief as amicus curiae that it "does not ... contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." At an earlier stage in this case, the Solicitor General told this Court: "The Department of State has advised us ... that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country...."

Essentially, the Court's basis for decision appears to be that alien inheritance laws afford state court judges an opportunity to criticize in dictum the policies of foreign governments, and that these dicta may adversely affect our foreign relations. In addition to finding no evidence of adverse effect in the record, I believe this rationale to be untenable because logically it would apply to many other types of litigation which come before the state courts. It is true that, in addition to the many state court judges who have applied alien inheritance statutes with proper judicial decorum, some judges have seized the opportunity to make derogatory remarks about foreign governments. However, judges have been known to utter dicta critical of foreign governmental policies even in purely domestic cases, so that the mere possibility of offensive utterances can hardly be the test.

If the flaw in the statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that that characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate. For example, the Uniform Foreign Money-Judgments Recognition Act provides that a foreign-country money judgment shall not be recognized if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system. And in the field of choice of law there is a nonstatutory rule that the tort law of a foreign country will not be applied if that country is shown

[4] The communication from the Bulgarian Government mentioned in the majority opinion in n. 2, apparently refers not to intemperate comments by state-court judges but to the very existence of state statutes which result in the denial of inheritance rights to Bulgarians

to be "uncivilized." Surely, all of these rules possess the same "defect" as the statute now before us. Yet I assume that the Court would not find them unconstitutional.

I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.

Mr. Justice White, dissenting.

I would affirm the judgment below. Generally for the reasons stated by Mr. Justice Harlan in Part IV of his separate opinion, I do not consider the Oregon statute to be an impermissible interference with foreign affairs....

> **Question.** More than 30 states have adopted versions of the Uniform Foreign Money Judgment Recognition Act, which prohibits the enforcement of any foreign judgment for money damages that "was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Have these states all violated the constitutional rule of *Zschernig*? What more, if anything, would you need to know to decide the answer to that question?

Arizona v. United States

Supreme Court of the United States, 2012.
567 U.S. 387.

Justice Kennedy delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S.B. 1070, the version introduced in the State Senate. Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." The law's provisions establish an official state policy of "attrition through enforcement." The question before the Court is whether federal law preempts and renders invalid [certain] provisions of the state law.

I

The United States filed this suit against Arizona, seeking to enjoin S.B. 1070 as preempted.... Two [provisions of the state statute] create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a

state misdemeanor. Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as § 5(C)....

II

A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, *see* [*e.g.*] *United States v. Curtiss–Wright Export Corp.*[5]

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.... This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz* (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. *See* §§ 1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense

[5] [Ed. note - For two cases discussing Congress's power over immigration, see *Chae Chan Ping v. U.S.* (1889) and *Fong Yue Ting v. U.S* (1893) on pp. 369-375 of the main casebook]

to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. *See* § 1229a(c)(4); *see also, e.g.,* §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities....

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State constitute, by one estimate, almost 6% of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to

implement the state-law provisions in dispute.

III

…. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. *See Crosby v. National Foreign Trade Council* (2000); *Gibbons v. Ogden* (1824). There is no doubt that Congress[, when regulating in an area of enumerated authority,] may withdraw specified powers from the States by enacting a statute containing an express preemption provision.

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive … that Congress left no room for the States to supplement it" or where there is a "federal interest … so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*(1947).

Second, state laws are preempted when they conflict with federal law. This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*; *see also Crosby* ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." *Rice*.

The … challenged provisions of the state law each must be examined under these preemption principles.

IV

A. *Section 3*

Section 3 of S.B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document … in violation of 8 United States Code § 1304(e) or 1306(a)." In effect, § 3 adds a state-law penalty for conduct proscribed by federal law.

The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate.

The Court discussed federal alien-registration requirements in *Hines*. In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." The new federal law struck a careful balance. It punished an alien's willful failure to register but did not require aliens to carry identification cards. There were also limits on the sharing of registration records and fingerprints. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." Because this "complete scheme ... for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce additional or auxiliary regulations." As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program.

The present regime of federal regulation is not identical to the statutory framework considered in *Hines,* but it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U.S.C. § 1304(e). Other aspects, however, have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Detailed information is required, and any change of address has to be reported to the Federal Government. The statute continues to provide penalties for the willful failure to register.

The framework enacted by Congress leads to the conclusion here, as it did in *Hines,* that the Federal Government has occupied the field of alien registration. See *American Ins. Assn. v. Garamendi* (2003) (characterizing *Hines* as a field preemption case). The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a "'harmonious whole.'" *Hines*. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." *Wisconsin Dept. of Industry v. Gould Inc.* (1986). Even if a State may make violation of federal law a

crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law. *See* [*e.g.*] *In re Loney* (1890) (States may not impose their own punishment for perjury in federal courts).

Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.* (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wisconsin Dept.* (States may not impose their own punishment for repeat violations of the National Labor Relations Act). Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

There is a further intrusion upon the federal scheme. Even where federal authorities believe prosecution is appropriate, there is an inconsistency between § 3 and federal law with respect to penalties. Under federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation. State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon). This state framework of sanctions creates a conflict with the plan Congress put in place. See *Wisconsin Dept.* ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity" (internal quotation marks omitted)).

These specific conflicts between state and federal law simply underscore the reason for field preemption. As it did in *Hines,* the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." Section 3 is preempted by federal law.

B. *Section 5(C)*

Unlike § 3, which replicates federal statutory requirements, § 5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Violations can be punished by a $2,500 fine and incarceration for up to six months. The United States contends that the provision upsets the balance

struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The law was upheld against a preemption challenge in *De Canas v. Bica* (1976). *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." At that point, however, the Federal Government had expressed no more than "a peripheral concern with [the] employment of illegal entrants."

Current federal law is substantially different from the regime that prevailed when *De Canas* was decided. Congress enacted IRCA [in 1986] as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc. v. NLRB* (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. *See* 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. *See* §§ 1324a(a)(1)(B), (b); 8 CFR § 274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. *See* 8 U.S.C. §§ 1324a(e)(4), (f); 8 CFR § 274a.10.

This comprehensive framework does not impose federal criminal sanctions on the employee side (i.e., penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. *See* 8 U.S.C. §§ 1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See § 1227(a)(1)(C)(i); 8 CFR § 214.1(e). In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. *See* 18 U.S.C. § 1546(b). Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct. *See* 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G).

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage

in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." … Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. But Congress rejected them. *See*, *e.g.*, 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives….

IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. *See* 8 U.S.C. § 1324a(h)(2). But the existence of an "express preemption provisio[n] does *not* bar the ordinary working of conflict preemption principles" or impose a "special burden" that would make it more difficult to establish the preemption of laws falling outside the clause. *Geier v. American Honda Motor Co.* (2000).

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*. Under § 5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees v. Lockridge* (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. See *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.* (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action").

Section 5(C) is preempted by federal law….

V

… The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on

a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law....

Justice Kagan took no part in the consideration or decision of this case.

Justice Scalia, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (1938). Today's opinion ... deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

I

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel, The Law of Nations (1758). There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." Mayor of New York v. Miln. (1837). And the Constitution did not strip the States of that authority....

Since the founding era ... primary responsibility for immigration policy has shifted from the States to the Federal Government.... Of course, it hardly bears mention that federal immigration law is now extensive. I accept that as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States. As this Court has said, it is an "'accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.'" *Fong Yue Ting v. United States* (1893). That is why there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in Art. I, § 9, which provided that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred

and eight…."

In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so. I accept as a given that state regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: There is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area—and the so-called field preemption arising from that action, upon which the Court's opinion so heavily relies—cannot be regarded as such a prohibition. We are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the *core* of state sovereignty: the power to exclude. Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that " Congress … unequivocally expres[s] its intent to abrogate," *Seminole Tribe of Fla. v. Florida* (1996). Implicit "field preemption" will not do….

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority….

The Government complains that state officials might not heed "federal priorities." Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

§ 3

> "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C.] § 1304(e) or 1306(a)." S.B. 1070, §

3(A).

It is beyond question that a State may make violation of federal law a violation of state law as well. We have held that to be so even when the interest protected is a distinctively federal interest, such as protection of the dignity of the national flag, see *Halter v. Nebraska* (1907) or protection of the Federal Government's ability to recruit soldiers, *Gilbert v. Minnesota* (1920). "[T]he State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes." *Id.* Much more is that so when, as here, the State is protecting its *own* interest, the integrity of its borders....

The Court's opinion relies upon *Hines v. Davidowitz*. But that case did not, as the Court believes, establish a "field preemption" that implicitly eliminates the States' sovereign power to exclude those whom federal law excludes. It held that the States are not permitted to establish "additional or auxiliary" registration requirements for aliens. But § 3 does not establish additional or auxiliary registration requirements. It merely makes a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law....

§ 5(C)

> "It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." S.B. 1070, § 5(C)....

Here, the Court rightly starts with *De Canas v. Bica* (1976), which involved a California law providing that " '[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.' " This Court concluded that the California law was not pre-empted, as Congress had neither occupied the field of "regulation of employment of illegal aliens" nor expressed "the clear and manifest purpose" of displacing such state regulation. Thus, at the time *De Canas* was decided, § 5(C) would have been indubitably lawful.

The only relevant change is that Congress has since enacted its own restrictions on employers who hire illegal aliens, 8 U.S.C. § 1324a, in legislation that also includes some civil (but no criminal) penalties on illegal aliens who accept unlawful employment. The Court concludes from this (reasonably enough) "that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." But that is not the same as a deliberate choice to prohibit the States from imposing criminal penalties.

Congress's intent with regard to exclusion of state law need not be guessed at, but is found in the law's express pre-emption provision, which excludes "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon *those who employ, or recruit or refer for a fee for employment,* unauthorized aliens," § 1324a(h)(2) (emphasis added). Common sense, reflected in the canon *expressio unius est exclusio alterius,* suggests that the specification of pre-emption for laws punishing "those who employ" implies the lack of pre-emption for other laws, including laws punishing "those who seek or accept employment." . . .

* * *

The brief for the Government in this case asserted that "the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely." Brief for United States. Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift.... [T]o say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind....

Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

Justice Thomas, concurring in part and dissenting in part.

... Despite the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*. I have explained that the "purposes and objectives" theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes. Thus, even assuming the existence of some tension between Arizona's law and the supposed "purposes and objectives" of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

Justice Alito, concurring in part and dissenting in part.

… [T]he Court's holding on § 5(C) is inconsistent with *De Canas v. Bica* (1976), which held that employment regulation, even of aliens unlawfully present in the country, is an area of traditional state concern. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest. I do not believe Congress has spoken with the requisite clarity to justify invalidation of § 5(C)….

The Court gives short shrift to our presumption *against* pre-emption. Having no express statement of congressional intent to support its analysis, the Court infers from stale legislative history and from the comprehensiveness of the federal scheme that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." Because § 5(C) imposes such penalties, the Court concludes that it stands as an obstacle to the method of enforcement chosen by Congress….

With any statutory scheme, Congress chooses to do some things and not others. If that alone were enough to demonstrate pre-emptive intent, there would be little left over for the States to regulate, especially now that federal authority reaches so far and wide. States would occupy tiny islands in a sea of federal power. This explains why state laws implicating traditional state powers are not pre-empted unless there is a "clear and manifest" congressional intention to do so.

Not only is there little evidence that Congress intended to pre-empt state laws like § 5(C), there is some evidence that Congress intended the opposite result. [*Justice Alito discusses the express preemption provision of Section 1324(a)(h)(2), described by Justice Scalia in his separate opinion, supra.*] … Surely Congress' decision not to extend its express pre-emption provision to state or local laws like § 5(C) is more probative of its intent on the subject of pre-emption than its decision not to impose federal criminal penalties for unauthorized work….

"Our precedents establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce of United States of America v. Whiting* (2011) (plurality opinion). I do not believe the United States has surmounted that barrier here.
